at which these difficult questions are appropriately addressed.[16]

b. Hardship of Withholding Court Consideration

Turning to the question of the hardship to the parties, as was true of the petitioners in Beach I, it cannot be said on the facts currently in the record that any particular hardship will befall the plaintiffs if judicial decision-making is withheld for now. First, in the instant case, it is as yet unknown

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[16] I note that several of the items which Veerman and Sixty Sutton contend require discovery so "that the factual record [can] be sufficiently developed to allow meaningful appellate review" (MacNaughton March 8, 1995 letter, p. 1) are exactly the issues that one would expect a franchising authority to consider during the franchising process, e.g.:

> The specific policies and practices of the "must-carry stations" that would be implemented if Liberty were required to have a franchise. This would establish the specific number of channels that Jack A. Veerman and Sixty Sutton Corp. will lose if the franchise requirement is imposed on Liberty.
>
> * * *
>
> The specific construction costs for building a cable television system in Community District 6 where the Sutton Building is located.
>
> * * *
>
> The specific burdens of complying with the mandatory federal standards for . . . rate regulation pursuant to 47 U.S.C. § 593.
>
> * * *
>
> The specific burdens of complying with mandatory state standards for . . . PEG channels pursuant to 9 N.Y.C.R.R. § 595.4.

Letter of W. James MacNaughton, Esq., dated March 8, 1995.

what the "costs of compliance," 959 F.2d at 985, with the local franchising scheme might be -- given that the franchising process is on-going (See, e.g., Second Bronson Aff. ¶¶ 1-3, Ex. A). I do note, however, that the time periods set for the initial steps toward a franchise are relatively short and, therefore, that any delay on account of the franchising process may well be brief. Id. Second, the analogy to the risk of "serious penalties", id., is, presumably, the threat that Liberty's cable service will be interrupted.[17] However, whether the defendants will exercise their regulatory authority in such a way as to impinge upon the constitutional rights of the plaintiffs simply cannot be ascertained as yet.[18]

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[17] As W. James MacNaughton, counsel for Sixty Sutton and Veerman, colorfully put it: "the sword of [D]amocles and an order to show cause . . . [are] about to chop those wires." (Tr. at 109).

[18] The State has pointed out that the outcome of the administrative proceedings commenced -- but temporarily halted -- against Liberty should not be presumed:

> In the administrative proceeding before the [NYSCC], Liberty will be provided a complete and full opportunity to present evidence to support the exempt status of any locations that are commonly owned, controlled or managed. Contrary to Liberty's claims in its Amended Complaint at Paragraphs 65-66, its service to subscribers will not necessarily be terminated. It is also not true that the [NYSCC] will necessarily order Liberty to sever connecting cable, or pay fines or sanctions. Merely because the Standstill Order has been issued does not mean that the Commission has issued a final determination in this matter. In at least one prior case in which the [NYSCC] issued an Order to Show Cause against a system that served a condominium

(continued...)

In addition, to the extent that any hardship might accrue to Liberty because of interruption to the Non-Common Systems it currently services or is ready to service, that hardship is of Liberty's own making. Liberty constructed its Non-Common Systems, including the system serving Sixty Sutton, from January 1993 to August 1994. (Price Aff. ¶ 12). Liberty did not, however, express any interest in obtaining a franchise from the City until October 28, 1994, several months after the NYSCC issued its Order to Show Cause. (Grow Aff. ¶¶ 7, 10, Ex. 8).

Liberty proffers a variety of reasons for its delay. First, Liberty asserts that it constructed its Non-Common Systems in reliance on alleged NYSCC and DOITT "policy" that a cable system which did not use City property or public rights-of-way did not qualify for and was not required to obtain a franchise. (Price Aff. ¶ 12). Liberty points to a April 27, 1992 letter from DOITT advising the Russian American Broadcasting Company ("RABC") that it did not need a franchise from the City to provide service because there was no proposed use of the inalienable property of the City. (Price Aff. ¶¶ 12-13; First Amd. Compl., Ex. C). Liberty also claims that its President, Mr.

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[18](...continued)
development, a Cease and Desist Order was not issued for one year. Even then, the [NYSCC] allowed the operator to apply for a franchise, which it did. The franchise was granted, and there was no interruption in service.

(Grow Aff. ¶ 32) (emphasis added).

Price, met with William Squadron, then DOITT's Commissioner, and Christopher Collins, then General Counsel, in mid-March 1992. (Price Aff. ¶ 14). Mr. Price claims that Mr. Squadron and Mr. Collins stated to him that Liberty did not need a franchise so long as no City property or rights-of-way were used. (Price Aff. ¶ 14). However, both Mr. Squadron and Mr. Collins have entirely different recollections of this meeting. They state that the issue of Liberty's operating Non-Common Systems was not discussed at the meeting, and that they both understood Liberty to employ service via microwave transmission, not via wire. (Collins Aff. ¶¶ 3-4;[19] Squadron Aff. ¶ 3).[20] Each also states unequivocally

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[19] Reference is to the Affidavit of Christopher Collins executed January 30, 1995. Collins states that at the meeting with Mr. Price:

> Mr. Price described to us [Collins and Squadron] a system which contemplated service to multiple buildings via microwave transmissions, not via wire. Since my understanding at that time was that Liberty's system exclusively employed microwave transmission between buildings, I can unequivocally aver that I did not make the statement Mr. Price has attributed to me.

(Collins Aff. ¶ 4).

[20] Reference is to the Affidavit of William F. Squadron executed January 30, 1995. Squadron states in part that:

> The installation which we inspected during that meeting was a single satellite reception antenna delivering cable television service to the residents of a single building, and Liberty's system, as described to us by Mr. Price, contemplated service to multiple buildings via microwave transmission, not via wire. I could not have stated that a "Non-Common System" operated by Liberty would not require a fran-

(continued...)

that Liberty never asked him or anyone else whether a franchise was required by the City. (Collins Aff. ¶ 5; Squadron Aff. ¶ 4). Given that the accounts of what happened at this meeting are flatly contradictory, I do not rely on either plaintiffs' or defendants' account of this meeting.

But, assuming arguendo that first, Liberty relied on the letter to the RABC, second, that such reliance was somehow reasonable,[21] and third, that government employees can waive the requirements imposed by law,[22] this still does not explain why

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[20](...continued)

> chise because my understanding, then, and throughout my tenure, was that Liberty's system exclusively employed microwave transmission between buildings.

(Squadron Aff. ¶ 3).

[21] According to the NYSCC, RABC provides services in a manner quite different from the way in which Liberty does.

> The original proposal by RABC was to provide a single channel of Russian language programming, which had been initially made available via transmission over-the-air and which the company also wished to provide through wire or coaxial cable.
>
> In contrast to the service provided by RABC, the service Liberty seeks to provide is a multi-channel service that includes the capacity to distribute as many as 72 channels. This service would be provided by wire or coaxial cable. . . . RABC's service is thus substantially different from the sort of service that Liberty seeks to provide.

(Grow Aff. ¶¶ 18-19).

[22] Under New York law, Liberty has no legal basis for relying on the RABC letter. See, e.g., Genesco Entertainment v. Koch, 593 F. Supp. 743, 749 (S.D.N.Y. 1984) (stating that "the New (continued...)

Liberty failed to approach DOITT and ask for a franchise. In addition, since January 1993, Liberty by its own admission has operated "cable systems" and is a "cable operator" required by the Cable Act to have a franchise. (Jacobs Aff. ¶ 7;[23] First Amd. Compl. ¶¶ 30-31). Furthermore, on June 1, 1993, the Supreme Court held in Beach III that SMATV operators which interconnect separately owned, controlled and managed building with cable were subject to the Cable Act, even if such cable is solely on private property.[24] Liberty clearly knew of this development in the

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[22](...continued)
York courts do not generally follow the doctrine of apparent authority in cases involving municipal defendants"). The District Court noted that, "New York places the burden of determining the scope of a municipal officer's authority upon those who deal with municipal government." Id. The Court explained that:

> Where the Legislature provides that valid contracts may be made only by specified officers or boards and in specified manner, no implied contract to pay for benefits furnished by a person under an agreement which is invalid because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the city. In similar case [sic] this court has given emphatic warnings that equitable powers of the courts may not be invoked to sanction disregard of statutory safeguards and restrictions.

Id. at 750 (quoting Seif v. City of Long Beach, 286 N.Y. 382, 387-88, 36 N.E.2d 630, 632 (1941)). See also Restatement Second of Agency § 167 comment c (1958).

[23] Reference is to the Affidavit of Robert S. Jacobs executed on January 13, 1995.

[24] The issue facing the Supreme Court was whether there was a rational basis that justified the distinction between cable facilities serving separately owned and managed buildings and those serving one or more buildings under common ownership or management. Id. at 2099. The Court concluded that the common-ownership (continued...)

law.[25] However, as noted above, Liberty did not contact the City with respect to a franchise until October 1994, after the NYSCC issued its Order to Show Cause, and even then, it was in a single-sentence letter stating only that Liberty was "interested in applying for a cable television franchise pursuant to the Resolution No. 1639 and applicable federal law." (Grow Aff. ¶¶ 7, 10, Ex. 8). Particularly in light of the Beach III decision, there is no satisfactory explanation as to why Liberty did not request a franchise promptly after June 1, 1993.[26]

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[24](...continued)
distinction was constitutional. Id. at 2102. The Court noted that the Court of Appeals "evidently believed that the crossing or use of a public right-of-way is the only conceivable basis upon which Congress could rationally require local franchising of SMATV systems," id. at 2104, but the Supreme Court held, to the contrary, that "there are plausible rationales unrelated to the use of public rights-of-way for regulating cable facilities serving separately owned and managed buildings." Id.

[25] In fact, Liberty wrote to the FCC on April 7, 1992 urging the FCC in no uncertain terms to defend the definition of "cable system" against the constitutional challenges brought by the Beach petitioners. (Jacobs Aff. ¶ 9; Ex. T).

[26] See, e.g., Conn. State Federation of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976). In that case, plaintiffs were teachers' local unions who alleged a deprivation of their First and Fourteenth Amendment rights. Id. at 475. Plaintiffs complained that, among other things, "as a matter of school board policy", the majority teachers' union was given access to school facilities for its meetings, but that other groups had to "apply" to a designated official for permission to use the facilities. The Court noted that the plaintiffs had failed to allege that the local had ever requested permission to use the school facilities for a meeting; that such a request was denied; or, that if a request had been denied, it was denied for a constitutionally impermissible reason. Id. The Court went on to say that:

> If the [plaintiffs' local] is given permission freely to hold its meetings in school facili-
>
> (continued...)

Finally, any claim by Liberty that it will suffer hardship during the pendency of the franchising process is undercut by its requests for a thirty-day extension of time in which to answer the Order to Show Cause (Grow Aff. ¶ 8, Ex. 4) and later a one hundred-eighty day adjournment during which it agreed not to construct any new Non-Common Systems (Grow Aff. ¶ 10, Ex. 6).

On the other hand, a substantial hardship will be imposed on NYSCC and DOITT if plaintiffs are permitted to proceed in this Court because those agencies' ongoing proceedings on this very issue will be interfered with. Since the ripeness doctrine is intended not only to protect courts from premature adjudication, but also to "protect the Agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," Abbott Laboratories, 387 U.S. at 148-149, 87 S.Ct. at 1515, this hardship must be weighed heavily. See also Payne Enters. v. United States, 837 F.2d 486, 493 (D.C. Cir. 1988) ("under the ripeness doctrine, the hardship prong of the Abbott Laboratories test is not an independent requirement divorced from the consid-

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[26](...continued)
> ties (and we will not assume, absent specific allegations, that the . . . defendants engage in unconstitutional conduct in this respect) the "difficulty" involved in requesting this permission from the designated official hardly can be considered an infringement on the First Amendment rights of [the local's] members.

Id.

eration of the institutional interests of the court and agency").

On balance, I find that it would be inappropriate to exercise judicial decision-making power at this time on these issues. See, e.g., Daley v. Weinberger, 400 F. Supp. 1288, 1291 (E.D.N.Y. 1975) (holding that physician's claims for declaratory and injunctive relief to prevent the FDA from inspecting her office not yet ripe where there was "no final agency action whose legality the court may pass upon" and noting that the "court is reluctant to anticipate what future action, if any, FDA may decide to take"), aff'd, 536 F.2d 519 (2d Cir. 1976), cert. denied, 430 U.S. 930 (1977).[27]

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[27] The situation facing the plaintiffs in the instant case can thus be distinguished from, e.g., that facing the plaintiff in Amico v. New Castle County, 553 F. Supp. 738 (D. Del. 1982), aff'd, 770 F.2d 1066 (3d Cir. 1985). There, plaintiff, who sought to open an adult entertainment center, contended that a county ordinance restricting where such facilities could be established impermissibly burdened his First Amendment rights, and the defendant moved to dismiss based, in part, upon ripeness. Id. at 739. The defendant argued that the case was not yet ripe because the plaintiff had not provided the county with information requested by the county without which, the county claimed, it could not make a final determination of plaintiff's application for his center. Id. at 742. Without that final determination, the county argued, the case was not ripe. Id. The Court rejected this argument. First, the Court pointed out that the county had not been able to specify what information it sought. Id. at 742-43. Second, and more importantly, the Court stated that it was "clear" that the county was not going to grant the plaintiff the necessary certificate of compliance. Id. at 743. This argument is inapplicable to the instant case, where it simply cannot be said that the City is going to deny Liberty a cable franchise.

Triple G Landfills v. Board of Comm'rs of Fountain County, 977 F.2d 287 (7th Cir. 1992) is inapplicable for similar reasons. In that case, plaintiff sought a declaration that a county ordinance regulating the development of landfills was impermissible under federal and state law. Id. at 288. The County argued that the case was not ripe because Triple G had not yet (continued...)

Despite Liberty's April 7, 1992 submission to the FCC agreeing that "the [Beach] Petitioners' claims of oppressive regulation are not yet ripe for decision" (Jacobs Aff., Ex. T at 2), plaintiffs contend that Beach I is inapposite. First, Liberty points to the Standstill Order, which forecloses Liberty from establishing Non-Commons Systems service to a number of buildings to which Liberty would otherwise commence the process of establishing cable service. Liberty claims that at that moment when Liberty is foreclosed from hooking up these other buildings, Liberty is harmed concretely enough to demonstrate that the action is ripe. However, Liberty's situation is in this regard no different from the situation facing the Beach petitioners. In Beach I, the Court noted that "[p]etitioners have

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[27](...continued)
applied for a state permit, the implication of which was that Triple G could not yet apply for a county permit, and so Triple G did not face an immediate threat of enforcement. Id. at 290. The Court found, however, that the case was ripe for reasons similar to those in Amico, namely, that the outcome was, in effect, predetermined:

> Given the virtually preclusive effect of the ordinance at the county level, there would be no point in requiring Triple G to engage in a state permitting process -- a process that the County itself admits is "withering and expensive." . . . The ripeness doctrine requires a live, focused case of real consequence to the parties. It does not require Triple G to jump through a series of hoops, the last of which it is certain to find obstructed by a brick wall.

Id. at 290-91. It cannot be said here that Liberty is certain to meet a brick wall in the franchising process. In addition, the Triple G Court noted that that case involved "purely legal" issues, id. at 289, whereas the instant case is fact-intensive.

standing because they currently operate external, quasi-private SMATV facilities or have concrete plans to operate such facilities." 959 F.2d at 980 n. 6. Thus, the fact that Liberty is providing cable service to subscribers and may have potential subscribers does not distinguish the ripeness of Liberty's claims from those of the Beach petitioners who also operated or had plans to operate SMATV facilities identical to Liberty's.

Second, Liberty attempts to distinguish Beach on the ground that the burdens which Liberty allegedly faces are more concretely known here. However, with respect to the burdens which might be imposed by the franchise, Liberty's situation differs little from that of the petitioners in Beach. As the Beach I Court put it:

> The Cable Act creates a franchise requirement, but gives localities broad discretion to determine the substance and process of franchising. The Act permits but does not require exclusive franchising. . . . Similarly, the Act does not generally require that localities impose special duties on franchisees, but simply permits localities to regulate cable rates, set aside public channels, or levy a franchise fee. And, in general, the statute gives only minimum specifications for the franchising procedures. In short, a locality could adopt a summary process for franchising every external, quasi-private SMATV facility, and local SMATV operators could discharge their . . . obligation by complying with this process. Such a franchising regime would pose very different First Amendment problems than a costly, exclusive-franchising system.

Id. at 983-84 (citations omitted). It is because of the degree of discretion given to the local franchising authorities that it cannot be said with assurance what the burdens of a franchise

awarded by DOITT might be for Liberty. In fact, Liberty itself recognizes that all of the burdens it may face are not yet known. (Liberty's Reply Mem. of Law in Supp. of Pls.' Mot. for a Prelim. Inj. at 32; Tr. at 58).

Liberty contends, however, that its dispute is ripe with respect to a number of "mandatory" burdens, that is, burdens which Liberty says are required to be imposed on it directly through federal regulation and which thus are now known. (Third Price Aff. ¶ 8).[28] As Liberty explained,

> If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, these obligations will include certain channel allocation requirements. Among these mandatory channel allocation requirements are "must-carry", see, 47 U.S.C. §§ 534 and 535, "leased access", see, 47 U.S.C. § 532, and public, educational and government ("PEG") channels, see, 47 U.S.C. § 531, Executive Law § 829(3) and 9 N.Y.C.R.R. § 595.

(Third Price Aff. ¶ 8). However, these requirements are the same as those that faced the petitioners in Beach. The Beach petitioners' "external quasi-private SMATV" is identical to Liberty's Non-Common System, and they faced precisely the same regulatory framework.

In addition, on the face of its pleading, Liberty is challenging the constitutionality of §§ 522(7) and 541(b),[29] that

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[28] Reference is made to the Affidavit of Peter O. Price executed on March 3, 1995.

[29] For example, in Liberty's first claim for relief, Liberty challenges the constitutionality of 47 U.S.C. §§ 522(7) and 541(b). (continued...)

is, the definition of a cable system and the franchising requirement imposed on such cable systems. With the franchising requirement, however, comes not only burdens but benefits, for example, the five percent cap on franchise fees contained in 47 U.S.C. § 542(b). Because the Second Amended Complaint is directed to the entire franchising requirement, such benefits are also subject to plaintiffs' challenge. The challenge in the Second Amended Complaint is not limited to a challenge of one or more of the mandatory burdens imposed,[30] and, indeed, certain such chal-

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[29](...continued)
(Second Amd. Compl. ¶¶ 71 - 75). Read together, these two sections impose the local franchising requirement, not mandatory federal burdens. The gravamen of the second and third claims is that Liberty was prohibited to operate its Non-Common Systems without a franchise, but DOITT did not provide for issuance of a franchise to this type of system. (Second Amd. Compl. ¶¶ 78, 81). The fourth, fifth, and sixth claims assert equal protection claims. (Second Amd. Compl. ¶¶ 84, 88). The sixth claim also asserts a Due Process claim. (Second Amd. Compl. ¶ 90). There is nothing in the rest of the claims asserted by Liberty even remotely susceptible of being interpreted as a challenge to mandatory federal burdens. (Second Amd. Compl. ¶¶ 92, 96, 99, 101, 104, 106). At no point in the pleadings does Liberty enumerate the particular burdens directly imposed by the Cable Act that it opposes. I also note that Liberty did not name the United States as a defendant.

[30] Liberty's challenge is different from a facial constitutional challenge to a particular aspect of the federal regulations. For example, the cable industry has challenged eleven provisions of the Cable Television Consumer Protection and Competition Act of 1992 and to two provisions of the Cable Communications Policy Act of 1984. See Daniels Cablevision v. United States, 835 F. Supp. 1, 3 n.1 (D.C. Cir. 1993), appeal docketed sub nom. Time Warner Entertainment Co. v. United States, D.C. Cir., No. 93-5349. In that litigation, the plaintiffs challenged various provisions individually, including rate regulation; must-carry; public access channels; limitations on ownership, control and utilization; vertically integrated programmers; public, educational and government access; and leased access. Id.

lenges could not be brought in this court.[31] Thus, plaintiffs' efforts to distinguish themselves from Beach by this method are unavailing.[32]

In short, defendants' motion to dismiss is granted with respect to Liberty's first cause of action.

2. Due Process

In its third cause of action, Liberty alleges that:

> Defendants' conduct which, inter alia, includes the prohibition of Liberty's operation of the Non-Common Systems without a franchise, and failure to provide the terms and conditions for issuance of a franchise to cable systems which do not use public property or rights-of-way, prevents, burdens, violates and interferes with Liberty's rights to engage in protected speech activity on private property in violation of the First Amendment.

(Second Amd. Compl. ¶ 81). The gravamen of Liberty's claim was that Federal and State regulations required Liberty to obtain a franchise, but that DOITT did not provide franchises for cable

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[31] For example, the constitutionality of the "must-carry" requirements set forth in 47 U.S.C. §§ 534 and 535 may only be heard by a district court of three judges convened pursuant to 28 U.S.C. § 2284. 47 U.S.C. 555(c)(1). I also note that the Supreme Court has addressed the constitutionality of the must-carry rules in Turner Broadcasting Sys. v. F.C.C., 114 S.Ct. 2445, 2469, 2472 (analyzing the must-carry rules under intermediate-level scrutiny and remanding in order to develop a more thorough factual record), reh'g denied, 115 S.Ct. 30 (1994).

[32] I also note the comment of the Beach court at 985: "Moreover, it is possible that petitioners might avoid the Hobson's choice between compliance and the risk of enforcement by bringing an anticipatory, as-applied challenge." The implication of this language is that a challenge more likely to be found ripe for adjudication would be a challenge to a particular burden which is going to be imposed, and not merely a broad attack upon the Cable Act itself.

systems such as Liberty's. This dilemma apparently constitutes the facts upon which plaintiffs rely on their sixth cause of action where they assert that "[d]efendants' conduct constitutes a denial of Plaintiffs' right to due process and equal protection in violation of the Fourteenth Amendment to the United States Constitution" (Second Amd. Compl. ¶ 90), and their eighth cause of action where they complain of Resolution 1639 as clearly inapplicable (ignoring Executive Law § 819)(2)), vague and investing the City with boundless discretion -- all in violation of plaintiffs' due process rights (Second Amd. Compl. ¶¶ 94-96).

The dilemma that Liberty faced when it filed its original complaint -- of being required to obtain a license to operate yet having nowhere to go to obtain one -- is not the current situation; the facts upon which plaintiffs relied in pleading these claims originally have changed.

It is undisputed that on February 24, 1995, DOITT published a notice of rulemaking regarding solicitations for franchises for the provision of cable service such as Liberty's, i.e., cable service which does not use the inalienable property of the City. (Second Bronston Aff. ¶¶ 1-2, Ex. A). According to DOITT, the rulemaking process is proceeding in accordance with the City Administrative Procedure Act. (Second Bronston Aff. ¶ 2). As part of this process, the public written comment period for the proposed rules is due to close on April 3, 1995, and a public hearing will be held on April 4, 1995. (Second Bronston Aff. ¶ 3, Ex. A). The proposed rules also set forth deadlines

for the submission of franchise applications, DOITT's review of such applications, and the preparation of franchise agreements. (Second Bronston Aff. ¶ 3, Ex. 1).

After DOITT certifies that an application is complete, it has sixty days to send a proposed franchise, which shall include "the terms of the applicant's certified application, the requirements of City Council Resolution 1639 and such other reasonable terms and conditions DOITT shall determine are appropriate to protect and advance the public interest." (Second Bronston Aff., Ex. A, § 6-03). Ultimately, in order for a franchise to be effective, it must be approved by the Franchise and Concession Review Committee as well as the Mayor. Id. There are no time limits on these particular steps in the franchising process. Id.

The intervening change in the factual circumstances necessarily altered the focus of Liberty's argument. As Lloyd Constantine, counsel for Liberty, stated at oral argument on March 1, 1994:

> "the day before yesterday, . . . there was no process. And now we have a process. And the process is fraught with and pock marked with boundless discretion."

(Tr. 45). At oral argument, Liberty complained that the RFP allowed the City unfettered discretion, both substantively and temporally, in how it grants franchises and that Liberty could

not wait as long as the City's process would require.[33] (See, e.g., Tr. at 10-11, 45-46).

Due to this intervening change in circumstances, it is apparent that Liberty's due process claims are not ripe. Unlike the situation when the action was filed, a procedure is in place through which Liberty can apply for a franchise. It has not done so, and, of course, it cannot be said at this point how long that process will take or what the substantive outcome will be. Rather than ruling in a vacuum on issues that might never arise, considerations of ripeness require that the process be permitted to go forward, both because certain issues might never arise and because a more fully developed factual record is required for reasoned adjudication of Liberty's claims. In short, the franchising process is ongoing; there has not been any final agency action taken. See Weissman v. Fruchtman, 700 F. Supp. 746, 755-57 (S.D.N.Y. 1988) (explaining that plaintiffs' procedural due

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[33] This claim is raised in the eighth cause of action.

> With the exception of its clear inapplicability to the Non-Common Systems, Resolution 1639 . . . is vague, and vests the City and DOITT with normless and unfettered discretion to grant or deny cable television franchises. Resolution 1639 purports to grant the City and DOITT normless and unfettered discretion to prevent and burden protected speech activity and is therefore facially invalid as violative of the due process clause of the Fourteenth Amendment.

(Second Amd. Compl. ¶ 96).

process claims were premature where city agency had not yet made a "sufficiently final decision").

In addition, as the City pointed out at argument, the Cable Act requires DOITT to act reasonably. 47 U.S.C. § 541(a)(1).[34] If DOITT acts unreasonably at some point in the future, either by unreasonably prolonging the proceedings or by imposing unreasonable burdens, Liberty has ready means to address the situation then on a more fully developed record of actual facts from which it may argue that a due process violation occurred rather than arguing from the possibilities and likelihoods relied on today.

With respect to the question of hardship to the parties of withholding decision, the same analysis applies here as applied to Liberty's First Amendment claim.

Thus, Liberty's Due Process claims are not ripe for adjudication.

B. Sixty Sutton's and Veerman's Claims

Plaintiffs Veerman and Sixty Sutton (the "Subscribers") assert, inter alia, that the requirements of the Cable Act

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[34] This section provides that:

> A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.

47 U.S.C. § 541(a)(1) (emphasis added).

interfere with their right to engage in protected speech activity on private property in violation of their First Amendment rights (Second Amd. Compl. ¶¶ 75, 78) and that defendants' conduct violates their due process rights (Second Amd. Compl. ¶¶ 90, 96). Defendants have also moved to dismiss these claims on, inter alia, the ground that they are not ripe. For the reasons set forth below, that motion is granted with respect to the Subscribers' First Amendment and due process claims.

1. First Amendment Claims

In asserting their various First Amendment claims, the Subscribers urge that they have a First Amendment right to receive information that is separate from Liberty's right to broadcast that information. In support of their position they cite, inter alia, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both. . . . [F]reedom of speech necessarily protects the right to receive.") (citations and internal quotations omitted); Lamont v. Postmaster General of United States, 381 U.S. 301, 308 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.") (Brennan, J., concurring); Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16, 22 (2d Cir. 1984) ("[T]he public . . . has First Amendment interests that are independent of the First Amendment

interests of speakers.") See also Board of Educ., Island Trees Union Free Schl. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (noting that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"); Sheryl A. Bjork, "Indirect Gag Orders and the Doctrine of Prior Restraint", 44 U. Miami L. Rev. 165, 187 (Sept. 1989) (arguing that the right to receive information exists "apart from the right to speak"); Rene L. Todd, "A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants", 88 Mich. L. Rev. 1171, 1190-91 (April 1990) (noting that "the [Supreme] Court has given little guidance as to the scope of a right to receive information").

Defendants, on the other hand, argue that the Subscribers' rights are wholly derivative from Liberty's rights and, thus, that the Subscribers do not have any greater First Amendment rights to receive cable programming than Liberty has to transmit it. See, e.g., Board of Educ., Island Trees Union Free Schl. Dist. No. 26 v. Pico, supra, at 867 (stating that the "right to receive ideas follows ineluctably from the sender's First Amendment right to send them"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., supra, 425 U.S. at 757 (stating that there is a First Amendment right to receive information and that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising) (emphasis added); In re Dow Jones & Co., 842 F.2d 603 (2d Cir.), cert. denied, 488

U.S. 946 (1988); Bicknell v. Vergennes Union High Schl. Bd. of Directors, 475 F. Supp. 615, 620-21 (D. Vt. 1979) (holding that a school board's decision to ban certain books from a high school library did not infringe students' First Amendment rights and explaining that "The right to receive information in the free speech context is merely the reciprocal of the right of the speaker. . . . The students' right to review those works through the school library, expressed as the Constitutional right to receive information, is no broader [than the rights of works purchased by the school library or retained on the shelves]"), aff'd, 638 F.2d 438 (2d Cir. 1980); George J. Baldasty & Roger A. Simpson, "The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment", 56 Wash. L. Rev. 365, 374-75, 393-95 (July 1981) (arguing that the "right to receive information" is "a derivative right appropriately encompassed by the first amendment").[35]

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[35] In League of Women Voters of California v. Federal Communications Comm'n., 489 F. Supp. 517 (C.D. Calif. 1980), the Court did not distinguish broadcasters and recipients of speech with respect to the threshold question of ripeness. Plaintiffs there sought declaratory and injunctive relief that 47 U.S.C. § 399(a), forbidding noncommercial broadcast licensees from editorializing, endorsing, or opposing candidates for public office, violated the First Amendment. Id. at 518. The plaintiffs included both broadcasters and would-be recipients of speech. Id. at 519-520. The non-broadcasters challenged the statute as interfering with their right to receive the free speech of broadcasters. Id. at 520. The Court dismissed the case, in part on ripeness grounds. Id. at 521. The Court noted that there was "a distinct likelihood" that the FCC would not seek to penalize the broadcaster, and that the hardship to the parties could not yet be determined. Id. at 520.

For example, in In re Dow Jones & Co., 842 F.2d 603, several news agencies appealed a "gag order" directed at prosecutors, defendants and defense counsel (but not the press) which was designed to prohibit all extrajudicial speech relating to the pending "Wedtech" case. The Court of Appeals explained that the right of the media to receive speech was derivative of the rights of the trial participants to speak and did not enlarge the would-be speakers' First Amendment rights. As the Court stated:

> [W]hen considering the merits, the press' right to receive speech does not enlarge the rights of those directly subject to the restraining order. Success on the merits for the news agencies is entirely derivative of the rights of the trial participants to speak.

Id. at 608.[36]

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[36] Similarly, in United States v. Simon, 664 F.Supp. 780 (S.D.N.Y. 1987), in which a number of news agencies asked the District Court to vacate an earlier version of the "gag order" at issue in Dow Jones, the Court stated that the news agencies' right to receive information was "entirely derivative" of the rights of the speaker. Id. at 786. As the Court explained:

> a potential recipient of speech faces a two-step hurdle before he may successfully challenge, on First Amendment grounds, a restraint on the right of others to speak. First, his right to receive speech becomes cognizable only when an individual has indicated a willingness to speak and is being restrained from doing so. See Virginia State Board, 425 U.S. at 756, 96 S.Ct. at 1822. Under such circumstances, the potential recipient would have standing to challenge the restraint. Even then, however, the challenge may be defeated if the restraints imposed upon the putative speaker are within the limits permitted by the Constitution. Thus, the potential recipient's rights are entirely derivative of those of the speaker.

Id. (emphasis added).

Assuming arguendo that the Subscribers' First Amendment rights are not derivative of Liberty's, the Subscribers do recognize that the government may regulate speech activity undertaken in the privacy of one's own home to protect third parties from injury. (E.g., Sixty Sutton's and Veerman's Reply Mem. at 3).[37] For example, as the Subscribers correctly note, a person may read pornography in the privacy of his or her own home. Stanley v. Georgia, 394 U.S. 557 (1969). In Stanley, the Supreme Court held that Georgia's asserted interest in preventing the poisoning of the minds of a reader of pornography was clearly insufficient to justify encroaching upon the right to be free from "unwanted governmental intrusions into one's privacy" -- a right which is of particularly great significance in the context of one's home. Id. at 564-66. However, this right is not absolute; in Osborne v. Ohio, 495 U.S. 103, 111 (1990), the Supreme Court held that states may proscribe the possession of child pornography. The difference between Stanley and Osborne, the Court explained, was that the statute challenged in Osborne was enacted in order to protect third parties, namely, the victim of child of pornography. Id. at 109.

Similarly, the Supreme Court has ruled in City of Ladue v. Gilleo, ___ U.S. ___, 114 S. Ct. 2038, 2041, 2047 (1994) that a statute which prevented homeowners from putting signs in their windows was unconstitutional. However, in Metromedia v. City of

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[37] Reference is made to the Reply Memorandum of Plaintiffs Sixty Sutton Corp. and Jack A. Veerman in Support of Motion for a Preliminary Injunction.

San Diego, 453 U.S. 490 (1981), in which the Court struck down a San Diego ordinance that imposed "substantial prohibitions on the erection of outdoor advertising displays within the city", id. at 493, the Court stated unequivocally that, "at times First Amendment values must yield to other societal interests." Id. at 501. The Court explained that in order to evaluate the constitutionality of an ordinance such as this, a court must "[assess] the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." Id. at 502. In order to do this, the Court continued, there need be "a particularized inquiry into the nature of the conflicting interests at stake . . . beginning with a precise appraisal of the character of the ordinance as it affects communication." Id. at 503. In the context of billboards, for example, the Court noted that the city's interest in traffic safety and its aesthetic interest in preventing "visual clutter" could prohibit commercial billboards in certain circumstances. Id. at 511-12. Thus, the lesson of City of Ladeo and Metromedia, as Subscribers so succinctly put it, is that "[h]omeowners can place signs in their windows . . . but not billboards on their front lawns because community interests in aesthetics are affected." (Reply Mem. of Pls. Sixty Sutton and Veerman in Support of Mot. for Prelim. Inj. at 3).

The relevant lesson of these two examples, pornography and billboards, is that the government may regulate speech activity, even speech activity taking place in a person's home,

in order to protect the interests of third parties. Applying this principle to the case at hand makes it apparent that the Subscribers' claims are not yet ripe.

As to the first prong of the Abbott Laboratories test, one may posit certain social interests justifying the imposition of regulatory burdens on Liberty which burdens would affect cable service to the Subscribers. However, those interests can only be debated in the abstract at this point; there is no record from which I can "[assess] the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." Metromedia, 453 U.S. at 502 (citations omitted).

For example, the concern has been raised that Liberty, if unrestrained by regulation, would "cherry pick" the most desirable buildings for its cable service. An informative discussion of the perils of cherry picking can be found, ironically enough, in a letter dated April 7, 1992 written on behalf of Liberty to the FCC by W. James MacNaughton, counsel to the Subscribers here, urging the FCC to defend the definition of "cable system" in the Cable Act in the Beach litigation. (Jacobs Aff. ¶ 9, Ex. T at 1). As counsel stated:

> Stated metaphorically, the Commission has always encouraged "cherry picking" by MDS and SMATV operators to promote competition with cable companies. . . . But once the "cherries" start getting plucked in bunches, then the interests of the local regulators and competing cable companies take on greater importance because more people and buildings in the community are affected. It is quite reasonable for Congress and the Commission to tell Petitioners that they must pick the "cherries" one at a time. This may be unpal-